UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

OUTSIDE IN

Employer, Joint Petitioner

and **Case 19-UC-227956**

OREGON AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75

Union, Joint Petitioner

DECISION AND ORDER

I. ISSUES

Upon a joint petition filed under § 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board to clarify the existing bargaining unit as set forth in the petition. Pursuant to the provisions of § 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director. The Oregon American Federation of State, County and Municipal Employees, Council 75 (the "Union") and Outside In (the "Employer") are the joint petitioners in this matter.

The sole question presented by the petition is whether Edward Charlton ("Charlton"), who occupies the position of Clinic Operations Assistant, is a confidential employee who should be excluded from the bargaining unit, or a non-confidential employee who should be included in the bargaining unit. During the pre-election process, the Employer and Union specifically agreed to defer the issue of whether the Clinic Operations Assistant should be included or excluded from the bargaining unit.

The hearing in this case took place on October 16, 2018 before a hearing officer of the Board, and I affirm that the rulings of the hearing officer are free from prejudice and error.

Based upon the record testimony, documents, post-hearing briefs filed by the parties, and legal standards discussed below, I have concluded that Charlton is a confidential employee, and as such his position shall be excluded from the existing bargaining unit at issue.

II. BACKGROUND FACTS

The Employer is a nonprofit corporation providing social aid services to both human and animal clients in the Portland, Oregon metropolitan area.[1] It has four administrative divisions. There are approximately 13 employees who work at Virginia Woof, an operation providing dog daycare services; the Virginia Woof employees are not part of the existing bargaining unit. The Employer employs about 70 employees in its Clinic operations, which provide medical services to homeless individuals and other disadvantaged populations. The Employer employs approximately 70 employees in its Youth department, which provides social services to at-risk youth. In addition, there are approximately 30 employees employed in Administration (also called Support Services), supporting the overall work of the Employer's organization.

On May 24, 2018, pursuant to an Board election conducted in Case 19-RC-219281, the Union was certified as the representative of the following classifications of employees across the Clinic, Youth, and Administration departments (the "Unit"): [2]

> All full-time, regular part-time, and on-call Acupuncture Clinic Assistants, Acupuncturists, Bookkeepers, Care Team Panel Managers, Career Development Coaches, Chinese Medicine Directors, Clinic Access Leads, Clinic Call Center Specialists, Clinic Call Center Specialist/Interpreters, Clinic Support Specialists, Clinic Support Specialist/Interpreters, Clinic Support Specialist and Leads, Community Health Outreach Workers, Data Analyst & Integrators, Data and QA Specialists (Youth Dept), Data & Reporting Specialists, Development Coordinators, Employment and Education Specialists, Fiscal Office Assistants, Health & Training Coordinators, Health & Wellness Coordinators, Housing Case Managers, Housing for Health Coordinators, Housing Navigators, Housing Specialists, Information & Referral Specialists, Interpreters, IT Specialists, Kitchen Supervisors, Lab Services Coordinators, Lab Services Technicians, Lead Housing Specialists, Lead Pharmacy Technicians, LGBTQ Youth Advocates, Maintenance Coordinators, Medical Assistants, Medical Billing Specialists, Outreach & Enrollment Specialists, Peer Mentors, Peer Support Specialists, Pharmacy Technicians, QA Coordinators, Quality Assurance Specialists, Records and Credentialing Specialists, SNAP Outreach Coordinators, Specialty Care Coordinators, Supported Employment Specialists, Syringe Exchange Specialists, Tattoo Removal Program Coordinators, Transgender Services Coordinators, Urban Ed Lead Teacher/Administrators, Volunteer Managers, Youth Engagement Specialists, Youth Specialists, Alcohol & Drug Specialists, Behavior Health Counselors, Case Managers, JRT Instructors, MAT Coordinators, Nurse Care Managers, Nurse Case Managers, Nurse Practitioners, Pharmacists, Physicians,

[1] The Employer stipulated that it is an employer engaged in commerce within the meaning of §§ 2(6) and (7) of the Act and is subject to the jurisdiction of the Board. It further stipulated that within the past twelve months, a representative period, the Employer derived revenues in excess of $250,000, and purchased and received goods and services valued in excess of $50,000 directly from points located outside the State of Oregon.

[2] The Union stipulated that it is a labor organization within the meaning of § 2(5) of the Act and is subject to the jurisdiction of the Board.

Psychiatrists, and Teachers employed by the Employer at its facilities in Portland, Oregon, and Milwaukie, Oregon; excluding confidential employees, and guards and supervisors as defined by the Act.

III. FACTS REGARDING EMPLOYEE CHARLTON'S STATUS

The Union and Employer have held approximately seven bargaining sessions as of the date of the hearing, with more expected in the future. The record is silent as to the date of the first bargaining session, but the third bargaining session took place August 17, 2018, the fifth session took place August 29, and the sixth session took place October 3.[3] The parties have not yet reached a collective bargaining agreement.

Jay Fernandez ("Fernandez") is the Human Resources Director and is a member of the Employer's collective bargaining team for the purposes of its bargaining with the Union regarding the Unit. Bill Aronson ("Aronson") is the Support Services Director and is also a member of the Employer's collective bargaining team.[4] The Employer's collective bargaining team meets with its Leadership Team on a regular basis in order to check in with them regarding bargaining. The Leadership Team includes Aronson, Medical Director Brian Little ("Little"), as well as the Finance Director, Development Director, Youth Services Director, and the Executive Director. On numerous occasions during the bargaining sessions between the parties, the Employer's representatives have told the Union's representatives that they needed to discuss their proposals and bargaining decisions with the Leadership Team before making final decisions or proposals.

Charlton is employed by the Employer as the Clinic Operations Assistant. He has held this position since being hired in June 2016. His job duties include facilitating the day-to-day operational duties of the clinic, providing help with clinic-related invoicing and billing matters, and managing the schedules of providers and medical staff in the clinic. Charlton testified that he was a "core organizer" during the Union's successful organizing campaign to represent the Unit. He attended the August 29 bargaining session as an employee observer, though according to notes he left after the first caucus.

According to his job description and duties, Charlton reports directly to two individuals. The first is the Associate Medical Director. The second is Timothie "Timmie" Rochon ("Rochon"). She is the Clinic Health Services Director. Rochon reports to Medical Director Little. However, in about August, the Associate Medical Director exited her position. As a result, the Associate Medical Director's responsibilities were then split up between Rochon and Little.

Until about August, Charlton did not often work directly with Little, instead assisting Little indirectly through Rochon. However, because some of the Associate Medical Director's duties have been delegated to Little, Charlton has worked directly with Little on a more regular

[3] Unless otherwise specified, all dates are 2018.
[4] During at least two bargaining sessions, August 29 and October 3, Fernandez, Aronson, and the Employer's legal counsel were the only management-side representatives present for bargaining.

basis since August. This includes a regularly scheduled weekly meeting in which Little delegates tasks to Charlton. Furthermore, Little has tasked Charlton with setting up and scheduling a recurring monthly meeting that Little holds with approximately 20 staffers.

As the Clinic Operations Assistant, Charlton is also part of the 10-member Clinic Health Services Leadership ("CHSL") team.[5] The other members of the CHSL team include Rochon and Little, as well as the Behavioral Health Sciences Supervisor, the RN Clinical Supervisor, the SBHC Operations Supervisor, the Compliance Manager, the Clinic Quality Improvement Manager, the Lead Benefits & Clinic Access Coordinator, and the Clinic Support Specialist. Other than Charlton, all of the members of the CHSL team are supervisory employees. Charlton has been assigned to provide administrative support to the CHSL team since the beginning of his employment with the Employer. However, evidence indicates that none of the individuals on the CHSL team have represented the Employer during collective bargaining sessions with the Union. Charlton is copied on group emails sent to all members of the CHSL team.

The CHSL team meets approximately once per week to discuss labor, safety, finance, and organizational issues involving the operations of the clinic. Not all members of the CHSL team attend every meeting, though a majority do. The meetings take approximately one to two hours, though they have averaged closer to two hours since bargaining between the Union and Employer began in or before August. Charlton's primary duty during the CHSL meetings is to take minutes and notes of the proceedings, though his notes also indicate that he provides some of his own input regarding staff concerns during these meetings. Charlton's notes and minutes are sometimes "verbatim" transcriptions of what CHSL team members say, and other times merely "summarize" the conversations of the CHSL team members.

Charlton saves his meeting minutes and notes to an Employer server within a specific CHSL folder. On some occasions, Charlton has included links to his CHSL notes in weekly emails that are sent to an "all clinic email distribution." The record is not conclusive as to whether this email is sent to all Clinic employees, or to what subsection of Clinic employees it is sent. Moreover, Charlton did not have concrete knowledge of whether or not the electronic CHSL folder is a restricted access folder. Charlton did not know what level of permissions are required to view the CHSL notes. Rochon testified that Charlton has the same permission level for viewing files as she does.

There are two other employees working in positions analogous to Charlton; one each in the Youth department and the Administration (Support Services) department. Those individuals are called the Youth Administrative Assistant and Support Services Administrative Assistant, respectively. The Union and Employer previously agreed that both the Youth Administrative Assistant and Support Services Administrative Assistant are confidential employees and are not included within the bargaining Unit. The record is silent as to precisely how similar Charlton's duties are when compared with the Youth Administrative Assistant and the Support Services Administrative Assistant. There is a Youth Services Leadership ("YSL") team within the Youth

[5] As noted above, CHSL is a different type of leadership team than the Leadership Team, the latter of which is made up of department directors.

Department, which is parallel to the CHSL. However, the record does not specify whether or not the Youth Administrative Assistant performs the same duties for the YSL as Charlton does for the CHSL.

On August 22, Charlton was present at a CHSL meeting which was also attended by Human Resources Director Fernandez and Support Services Director Aronson. During this meeting, Fernandez brought up issues related to the collective bargaining process. Charlton immediately became aware that he was about to be exposed to the Employer's bargaining demands and strategy and that having access to that information would create a conflict of interest with his potential inclusion in the bargaining Unit. Charlton had not received any advance notice that Fernandez would be attending this CHSL meeting or bringing up collective bargaining concerns, and so Charlton asked to be excused from the meeting. He was in fact excused from that meeting, as reflected in the Employer's notes from the August 22 meeting.[6] However, because Charlton's duties had always included being the scribe for the CHSL meetings, the Employer obligated Charlton to attend subsequent CHSL meetings where collective bargaining issues were discussed.

Since the August 22 meeting, Fernandez has attended most or all of the CHSL meetings, specifically in order to receive feedback from the CHSL members about the Union's collective bargaining proposals. Discussing collective bargaining issues has become a standing item on the CHSL agenda since August 22. By Fernandez' admission, the CHSL does not have a final say on what is included or excluded from the Employer's bargaining proposals.

Charlton was present at the August 29 CHSL meeting, which was again attended by Fernandez and Aronson. During the meeting, Little and Fernandez discussed whether employees are "part of the Union" before completing probation and whether or not *Weingarten* rights would make the new employee disciplinary period more difficult. Charlton's notes also included a section titled "Union update" which summarized issues to be discussed during the bargaining meeting scheduled for that night. This included discussions of "what information can be passed on the union", as well as what rights the Employer's managers would have when hiring employees, and the nature of the grievance procedure.

Charlton was present at the September 5 CHSL meeting. The Union and Employer were on a collective bargaining hiatus until October, but there was nonetheless a "Union update" during this meeting. Fernandez and other members of the CHSL team discussed the details of how the Employer planned to counter the Union's proposal to have a say in when an employee is removed from the probation process, specifically that the Employer would contend it is a management right and that they would propose to lengthen the probation period. Charlton's notes from the meeting also document a discussion between Little and Fernandez about whether or not the probationary period would involve a modified or limited version of progressive discipline. Additionally, Fernandez asked the CHSL to create language to be used in the job descriptions where "process improvement" is part of all jobs, even entry-level jobs.

[6] Charlton is normally the individual who types up the minutes and notes of the CHSL meetings, but because he "stepped out due to Union matters", another Employer representative typed up the August 22 CHSL notes.

On October 3, the Union and Employer met for bargaining, and the Union provided the Employer with multiple complete proposals on different subjects, including hours of work, overtime, safety, Union and member rights, performance evaluations, contracting out, training and education, and an inclement weather policy. During this meeting, the Employer counter-proposed to extend the new employee probationary period to 180 days.

On October 5, Fernandez attended the weekly CHSL meeting. Charlton was present throughout the meeting and took notes, including a section titled "Labor Management Update." According to these notes, Fernandez and the CHSL discussed the Union's proposal that staff be paid overtime on a daily basis and a proposal that salaried employees be given an extra day of paid time off ("PTO") if they worked over 45 hours per week. Little responded to that proposal by explaining it would require the Employer to police admin time more strictly than it had in the past. The CHSL also discussed how the Employer would propose to define "qualified trauma" in response to the Union's proposal that employees receive 90 days of "mental health time" if they had experienced trauma. There was also a discussion about the Union's proposal not to contract out work, with Little saying the Employer would need to have needs assessments. In addition, Fernandez said that they were planning to set aside more time for the bargaining team and CHSL to discuss proposals. Fernandez announced that he was going to send proposals and language to the CHSL.

Later on the evening of October 5, Fernandez emailed the entire CHSL team – including Charlton – with electronic copies of all the bargaining proposals the Union had presented during the October 3 bargaining session. In the email, Fernandez asked the CHSL members "please do not share or discuss outside of the leadership team." However, the bargaining session in which the Union had presented these proposals is not closed, and employees who are not members of either bargaining team may serve as "observers" during such bargaining sessions. In addition, the copies of the Union proposals that Fernandez emailed were not notated or marked up.

As of the hearing date, October 16, Fernandez confirmed that he and Aronson were beginning to email copies of the Employer's draft bargaining proposals to the CHSL and YSL.[7] These are proposals that have not yet been provided to the Union and are being circulated to these teams for their input.

Charlton expressly admitted during the hearing that, in his capacity as a member of the CHSL, he has been privy to the Employer's formulation of collective bargaining proposals and counterproposals. Moreover, Charlton admitted that these counterproposals are confidential information, that they are not to be shared with bargaining Unit members, and that they are not to be shared with the Union. In addition, Charlton's own notes from different CHSL meetings contain details about the Employer's draft counterproposals that the Union was not aware of.

[7] Fernandez testified that the Employer had sent out the first bargaining proposals to the CHSL on or about October 16, and if they had not already been sent out were about to be sent out in the upcoming days.

IV. LEGAL ANALYSIS

The Supreme Court formally approved the Board's longstanding policy decision to exclude confidential employees from bargaining units in spite of the fact that confidential employees are not necessarily § 2(11) supervisors or § 2(13) agents of an employer. Such employees have the right to engage in § 7 activities, and to receive the protections of the Act, but are not suitable for inclusion in a bargaining unit due to their close relationship with management-side individuals who formulate labor policy.

Specifically, the Supreme Court affirmed the Board's decision to limit "confidential employee" status "to only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981). This standard is known as the "labor-nexus" standard. *Id.*

In the same case, the Supreme Court affirmed that employees may be found to be "confidential" employees depending on their access to confidential information:

> [C]onsistent with the underlying purpose of the labor-nexus test, [the Board has also] designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, 'regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.'

Id. at 189 (citing *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762–763 (1974)).

Because the Employer is the party moving to exclude Charlton from the Unit, the Employer "bears the burden of proving that claim." *Erica Inc.*, 344 NLRB 799, 805 (2005). Evaluating Charlton's duties under the first test, there are some number of factors that indicate Charlton is a confidential employee. First and foremost, he is a de facto secretary to a leadership team comprised solely of non-Unit supervisory employees. Moreover, this leadership team has been consulted by the Employer's collective bargaining representatives on a weekly basis, for the purposes of receiving feedback on and formulating collective bargaining proposals.

However, it is true that none of the individuals Charlton expressly assists on the CHSL team directly proposes or finalizes labor relations proposals. Fernandez and Aronson, who do formulate labor relations policy due to their position at the bargaining table, work in different departments from Charlton and do not utilize Charlton as their administrative assistant. Moreover, the Employer's "Leadership Team", which is consulted for the purposes of formulating collective bargaining proposals, includes only one CHSL member (Little).

It is arguable that the members of the Leadership Team "formulate, determine, and effectuate" labor policy. Nonetheless, the record indicates that Charlton does not assist or aid any of those individuals in a "confidential capacity." *Hendricks Cty.*, 454 U.S. at 170. While Charlton has directly assisted Little on some occasions since August 2018, and has a regularly

scheduled meeting with Little, no evidence was provided showing that Little had entrusted Charlton with labor-management type issues, nor that Charlton was acting as a personal secretary to Little. In addition, Charlton is not himself a member of the Leadership Team, does not serve as the scribe or administrative assistant to the Leadership Team, and does not observe the private meetings of the Leadership Team.

In *Consol. Papers, Inc.*, 179 NLRB 165 (1969), the Board found that a high-ranking supervisor who did research and formulated recommendations relied upon by an employer's negotiator did not render said supervisor a person who "formulates, determines, or effectuates" labor relations policy, and as such his secretary was not a confidential employee under the "labor-nexus" standard. *Also see Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971) (That corporate officials consulted with certain supervisors before bargaining sessions did not render the secretaries of those supervisors' confidential employees); *Eastern Corp.*, 116 NLRB 329, 333 (1956). Rochon and the rest of the CHSL team, excepting Little, have a role in labor management policy which is analogous to the supervisors and managers in the above-cited cases; they are consulted in the formulation of labor relations policy but do not determine or effectuate that policy. In addition, Charlton is not a personal secretary, per se, but an administrative assistant who supports the Clinic operations more generally. He does not serve as a confidential administrative assistant in the "normal course of [his] duties." *W. Chem. Prod., Inc.*, 221 NLRB 250, 251 (1975).

In its post-hearing brief, the Employer cites to *Reymond Baking Co.*, 249 NLRB 1100 (1980), for the proposition that Charlton is a confidential employee. However, the individual in *Reymond Baking* was the only typist for the employer and so was tasked with typing up all bargaining proposals and labor management documents. Moreover, in this capacity the typist directly reported to and aided the two managers who were in charge of formulating, effectuating, and determining labor policy for each of two bargaining units. This case is clearly distinguishable from Charlton's situation; among other things, Charlton has not typed up any actual bargaining proposals or labor management documents and he does not directly assist either Fernandez or Aronson, who are analogous to the two supervisors in *Reymond*.

I therefore find that Charlton is not a "labor-nexus" confidential employee. Having found that Charlton does not act in a confidential capacity to the persons who actually formulate, determine, and effectuate labor policy, the question then turns to whether or not Charlton has access to confidential information regarding projected changes that may result from collective bargaining. *See Pullman Standard*, 214 NLRB 762, supra. In *Inland Steel*, 308 NLRB 868 (1992), the Board emphasized that this standard has relatively narrow application:

> Board law makes clear that mere access to confidential labor relations material such as personnel files, minutes of management meetings, strike contingency plans, departmental strategic planning and grievance responses is not sufficient to confer confidential status unless it can be shown that the employee at issue played some role in creating the document or in making the substantive decision being

> recorded or has regular access to labor relations information before the union or employees involved.

Id. at 877.

Even given these limitations, it is clear that Charlton does have access to confidential information. For one specific example, Charlton was privy to the Employer's discussion of how it would have to tighten up its policing of admin leave if it were to accept the Union's proposal regarding PTO for salaried employees. In addition, as of about the date of the hearing, Aronson and Fernandez had begun sending copies of the Employer's draft bargaining proposals to the entire CHSL, including Charlton. In addition, while Charlton does not directly or regularly assist Fernandez or Aronson in the course of his duties, he has taken notes for management meetings that include comprehensive "Union updates" which are personally led by Fernandez and/or Aronson. This is more than "mere access" to department-level strategic planning, but access to the thoughts of the Employer's lead negotiators. In addition, Charlton admitted during the hearing that he has been privy to the Employer's bargaining proposals before those proposals have been shared with the Union, while knowing that the information is not to be disclosed to the Union. In addition, Charlton has access to other CHSL notes, such as the notes from the August 22 CHSL meeting that Charlton excused himself from, because he shares the same permission level as other CHSL team members.[8]

Even though Charlton's CHSL notes are not always so precise as "reveal the exact terms the Employer would be willing to accept in any subsequent negotiations,", he is nonetheless in possession of the kind of internal bargaining information which discloses "particularly sensitive matter[s] with respect to contract negotiations [that], if revealed to the Union, could seriously impair the Employer's ability to negotiate." *Bakersfield Californian*, 316 NLRB 1211, 1213 (1995) (Finding confidential an employee who had regular access to the labor strategy notes of a department head and bargaining negotiator). In fact, Charlton not only has access to such sensitive information, he directly observes and personally documents the conversations and policy details. The Union's attempt to distinguish *Bakersfield Californian* is unavailing; if anything, Charlton has direct, in-person access to a greater quantity of more sensitive labor relations information than the confidential employee in that case.

I therefore find that Charlton is a confidential employee under the *Pullman Standard* "access to confidential information" standard.

V. ORDER

I find, and it is hereby ORDERED, that the Unit be clarified to exclude the position of Clinic Operations Assistant.

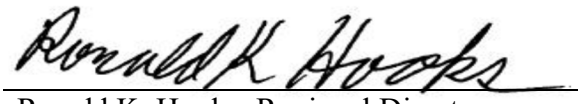
[8] It should nonetheless be noted that some CHSL information Charlton has access to is not confidential information, even though the Employer has attempted to restrict disclosure of that information. For example, Fernandez' October 5 email, where he merely copied the Union's already-disclosed bargaining proposals, was not confidential information of the kind contemplated in *Pullman Standard.*

RIGHT TO REQUEST REVIEW

Pursuant to § 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of § 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **November 28, 2018.**

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED at Seattle, Washington, on the 14th day of November, 2018.



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